



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

HD:hd
Docket No: 06524-99
11 May 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: LT [REDACTED], CHC, USN [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 13 Oct 99 w/attachments
(2) PERS-311 memo dtd 13 Jan 00
(3) PERS-61 memo dtd 8 Feb 00
(4) DCNO NIJ memo dtd 4 Apr 00
(5) Subject's memo dtd 27 Apr 00 w/enclosures
(6) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected by removing the fitness reports for 31 August 1994 to 31 January 1995, 1 February 1995 to 31 January 1996 and 1 February to 5 August 1996, copies of which are at Tabs A, B and C, respectively. He further requested that a statement from this Board be filed in his official record reflecting the racial harassment he received from his superiors.

2. The Board, consisting of Messrs. Leeman and McCulloch and Ms. Nofziger, reviewed Petitioner's allegations of error and injustice on 11 May 2000, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. The three contested fitness reports are all the reports Petitioner received from his tour with the Commander, Fleet Activities, Yokosuka, Japan. Petitioner, who is an African American, seeks removal of these reports because of racial remarks made by the command chaplain and deputy command chaplain, as substantiated by a Naval Inspector General (NIG) investigation. He maintains that the command chaplain lacked the moral authority to evaluate

his abilities as a Navy chaplain, and that the low evaluations at issue were in reprisal for his having complained to the NIG.

c. In correspondence attached as enclosure (2), PERS-311, the Navy Personnel Command (NPC) office having cognizance over fitness report matters, concluded that Petitioner's fitness report record should remain unchanged. However, they recommended that the petition be forwarded to PERS-61, the equal opportunity division, for comment on Petitioner's allegation of racial discrimination and abuse of authority. They stated that if PERS-61 determines that racial discrimination and abuse of authority did indeed occur, they would have no objection to removing the contested fitness reports.

d. In correspondence attached as enclosure (3), PERS-61 concluded that the fitness reports should remain as written, but that the petition should be forwarded to the minority affairs office for comment.

e. In correspondence attached as enclosure (4), the Deputy Chief of Naval Operations (N1J) office having cognizance over minority affairs concluded that the fitness reports for 31 August 1994 to 31 January 1995 and 1 February 1995 to 31 January 1996 should remain as is, but that the report for 1 February to 5 August 1996 should be removed.

f. Petitioner's letter at enclosure (5) reflected his disagreement with the unfavorable aspects of the advisory opinions, and insisted that the low marks in the contested fitness reports had been given as retribution for his complaint to the NIG.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board finds an injustice warranting partial relief, specifically, removal of Petitioner's fitness report for 1 February to 5 August 1996.

In finding that this report should be removed, the Board substantially concurs with the advisory opinion from N1J at enclosure (4). They concur with all three advisory opinions, at enclosures (2) through (4), in finding that the other two fitness reports in question should stand.

The Board finds that Petitioner's request to enter a statement in his record should be denied. They are unable to determine, with any specificity, what wording he wants the requested statement to reflect. Further, they note that he had a chance to submit statements to the contested fitness reports, in which he could have provided any factual information he felt his record should reflect regarding his treatment by his superiors. Finally, they observe that by means of correspondence with selection boards, he may communicate to the boards any information about his treatment he wants them to have.

In view of the above, the Board directs the following limited corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing therefrom the following fitness report:

Date of Report	Reporting Senior	Period From	of Report To
96Aug05	CAI [REDACTED]	96Feb01	96Aug05

b. That there be inserted in Petitioner's naval record a memorandum in place of the removed report containing appropriate identifying data concerning the report; that the memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

e. That the remainder of Petitioner's request be denied.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

Jonathan S. Ruskin
JONATHAN S. RUSKIN
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



For W. DEAN PFEIFFER
Executive Director



DEPARTMENT OF THE NAVY

NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

6524-99

1610
PERS-311
13 January 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: PERS/BCNR Coordinator (PERS-00ZCB)

Subj: LT [REDACTED]

Ref: (a) BUPERSINST 1610.10 EVAL Manual
(b) BUPERSINST 1611.17 NAVY OFFICER FITNESS REPORT (FITREP) MANUAL

Encl: (1) BCNR File

1. Enclosure (1) is returned. The member requests the removal of the following fitness reports from his record:

31 August 1994 to 31 January 1995
1 February 1995 to 31 January 1996
1 February 1996 to 5 August 1996

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the reports in question to be on file. They are signed by the member acknowledging the contents of each and his right to submit a statement. The member indicated he wanted to submit a statement for the fitness report for the period 1 February 1995 to 31 January 1996. The member's statement and first endorsement has not been received by PERS-311.

b. Lieutenant [REDACTED] states that the fitness reports were issued in retaliation because he submitted a Hotline complaint to the Office of Naval Inspector General which resulted in the command chaplain was investigated for racial discrimination and abuse of authority.

c. In viewing petitions which question the exercise of the reporting senior's evaluation responsibilities we must determine if the reporting senior abused his/her discretionary authority. For us to recommend relief, the petitioner has to show that either there is no rational support for the reporting senior's action or that the reporting senior acted for an illegal or improper purpose. The petitioner must do more than just assert the improper exercise of discretion, he/she must provide evidence to support the claim. I do not believe Lieutenant [REDACTED] has done so. The fitness report itself represents the opinion of the reporting senior. Nothing provided in the

petition shows that the reporting senior acted for illegal or improper purposes or that the reports lacked rational support.

d. The member includes a copy of the Hotline complaint investigation with his petition which concluded that the alleged racial discrimination and abuse of authority was not substantiated.

e. The member does not prove the report to be unjust or in error.

3. We recommend the member's record remain unchanged and the member's petition be forwarded to the Director, Equal Opportunity Division (Pers-61) for comments on the member's allegation of racial discrimination and abuse of authority. If (PERS-61) determines that racial discrimination and abuse of authority did indeed occur, we would have no objection of removing the fitness report covering the period in

A large, dark, irregular redacted area covering the signature of the official.

Head, Performance
Evaluation Branch



DEPARTMENT OF THE NAVY

NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1610
PERS-61/017
8 Feb 00

6524-99

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Via: Assistant for BCNR Matters, PERS-00ZCB

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN CASE OF
LIEUTENANT [REDACTED] SN, [REDACTED]

Ref: (a) BCNR PERS-00ZCB memo of 19 Jan 00
(b) OPNAVINST 5354.1D Navy EO Manual

Encl: (1) BCNR File 06524-99

1. Reference (a) requested an advisory opinion in response to LT [REDACTED] request to remove fitness reports for the periods 31 August 1994 to 31 January 1995, 1 February 1995 to 31 January 1996, and 1 February 1996 to 5 August 1997 from his permanent record. Enclosure (1) is returned. *dm*

2. Lieutenant [REDACTED] alleges that the three fitness reports were written based on racism and retaliation. [REDACTED] made his first Navy IG Hotline complaint on 14 February 1996. He alleged racial discrimination, abuse of authority and reprisal at the Chaplains' Office, Fleet Activities, Yokosuka, Japan. An investigation was initiated by CINCPACFLT. [REDACTED] made a second hotline complaint on 21 April 1996 alleging that he was being threatened and reprimed against by the senior chaplains for having made the initial complaint. So a second investigation was initiated.

3. The Navy IG responded to [REDACTED] in a letter dated 25 April 1997. The allegations were unsubstantiated. It was also noted that the first two fitness reports could not have been written as reprisal since his first formal complaint was not made until 14 February 1996. The investigation did disclose that the senior chaplains were insensitive in some of their remarks made at staff meetings.

4. The detaching fitness report ending 5 August 1997 *6 Jan* had two marks of 2.0 and the rest were 3.0 marks. The written remarks explain in detail the deficiencies. The fitness report is the opinion of the commanding officer and contains a continuing theme documented in the previous two fitness reports.

6524-99

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN CASE OF
LIEUTENANT [REDACTED] USN, [REDACTED]

5. Based on the information provided, it is my opinion the alleged racial discrimination or reprisal does not exist in accordance with reference (b). I recommend that the reports remain as written. However, since [REDACTED] referenced the Minority Affairs Office in his letter to BCNR, recommend N1J be given the opportunity to comment.

[REDACTED]

Director, Professional
Relationships Division
(PERS-61)



DEPARTMENT OF THE NAVY
CHIEF OF NAVAL PERSONNEL
WASHINGTON, D.C. 20370-5000

652499
IN REPLY REFER TO
4 April 2000

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL
RECORDS

Via: Assistant for BCNR Matters (PERS-00ZCB)

Subj: LT [REDACTED] U.S. USN, [REDACTED]

Ref: (a) BCNR memo dated 23 Feb 00
(b) OPNAVINST 5354.1D

Encl: (1) BCNR File ICC [REDACTED]

1. Per reference (a), enclosure (1) was reviewed. It is my understanding [REDACTED] N, is requesting removal of three fitness reports dated, in order: 31Aug94-31Jan95, 1Feb95-31Jan96, and 1Feb96-5Aug96. These three reports cover his entire assignment period to Commander, Fleet Activities, Yokosuka (CFAY).

2. It appears that the basis [REDACTED] titution - to remove the mentioned fitness reports - is founded in Dec 95 racial remarks made by his immediate superior, [REDACTED] N, who was the Command Chaplain at CFAY. Further, [REDACTED] alleges that his subsequent reporting of those remarks (and other grievances) to the Navy Inspector General (IG) in Feb 96 and, again in Apr 96, resulted in command retribution. Specifically, that he was given "low evaluations from CFAY" because of those calls to IG. [REDACTED] includes in enclosure (1) several other instances of perceived command retribution (before and after his initial Feb 96 call to IG) - primarily related to command denials of certain personal and work requests and other work environment situations.

3. After reviewing the investigations and related endorsements in enclosure (1), it appears several different officials substantiated that racially derogatory remarks were indeed made in the presence [REDACTED]. It also appears that these same officials agree that those remarks were not specifically directed [REDACTED]. Consequently, all endorsements seem to conclude that there was no racial discrimination and, subsequently, that retribution (in several forms alleged by LT [REDACTED]) occur.

4. It is my opinion that a discriminatory practice did occur. To utter a racially derogatory term in front of persons of that same race - whether or not specifically directed at any individual - is potentially, if not likely, offensive to all that hear it. The Navy Equal Opportunity Manual, reference (b), is the standard for EO matters. It defines discrimination as:

"An act, policy, or procedure that arbitrarily denies equal treatment to an individual or a group of individuals because of race, color, religion, gender, national origin, or ethnicity."

It is the perception of the individual offended by such remarks that initially establishes a discriminatory practice. Additionally, that the remark came from [REDACTED] immediate superior could establish a mind-set [REDACTED] retribution could follow if reported.

5. Realizing the subjective nature of interpretation, whether action is taken is, appropriately, the result of third-party investigators and other officials. It is disturbing that no action, beyond

"initial counseling", against [REDACTED] recommended or taken due to his "pending retirement in Jul 96" (this was stated Jun 96 in an investigation endorsement by Commanding Officer [REDACTED]'s reporting senior for fitness reports). This same endorsement is also the first mention, in enclosure (1), that the command was "instructed to be more cognizant of [REDACTED] sensitivities." Again, this is disturbing as the first described command corrective action - only a result of the CO's required endorsement to the IG investigation that LT [REDACTED] completed.

6. Several documents, in enclosure (1), establish the retribution or non-retribution nature of several work situations cited by [REDACTED]. For the purposes of the IG investigation of retribution, it was important to establish the start time (Feb 96) of the "protected communications" from [REDACTED]. Generally, it was found that retribution did not occur in the several instances described by [REDACTED] before Feb 96. Other instances before Feb 96 were dismissed as not being retribution due to timing.

7. For the purpose of answering [REDACTED] IR petition, I believe that the 31Aug94-31Jan95 and the 1Feb95-31Jan96 fitness reports should remain "as-is". However, I doubt the true command environment established [REDACTED] immediate superior and reporting senior after the initial Feb 96 call to IG. Although IG did not substantiate the specific retribution acts cited by [REDACTED], it is clear that a discriminatory practice occurred. Because his immediate superior initiated this discriminatory practice, [REDACTED] fitness report for the period after Feb 96 should not be considered. I recommend removal of the 1Feb96-5Aug96 fitness report.

[REDACTED]
Commander, U.S. Navy
Special Assistant for Minority Affairs